

<b>ISLE OF ANGLESEY COUNTY COUNCIL</b>	
<b>Report to</b>	<b>Executive Committee</b>
<b>Date</b>	<b>10.12.12</b>
<b>Subject</b>	<b>Procurement of Capital Works in connection with Council Housing Stock</b>
<b>Portfolio Holder(s)</b>	<b>Councillor O Glyn Jones,</b>
<b>Lead Officer(s)</b>	<b>Shan Lloyd Williams, Head of Housing Services</b>
<b>Contact Officer</b>	<b>Dafydd Rowlands, Technical Services Manager</b>
<b>Nature and reason for reporting</b>	
To update Members on the current position in relation to the future procurement of Capital Works in connection with the Council's Housing Stock.	

<b>A – Introduction / Background / Issues</b>	
<b>1.0</b>	<b>Introduction</b>
1.1	A report was submitted to the Housing and Social Services Scrutiny Committee on 19 <sup>th</sup> October, 2010 setting out options available for procuring Capital Works and recommendations for future policy.
1.2	Members are requested to note that further action on the content of the report did not occur due to Corporate commitment and support for the work of the North Wales Procurement Partnership (NWPP). During 2011 the NWPP commenced an ambitious collaborative procurement project across all North Wales Authorities which included a category for Council House Improvements. Regrettably, during this summer, the NWPP, in consultation with participating authorities, concluded that the procurement exercise would not deliver desired outcomes and the project was aborted.
1.3	Since 2008/09 the Housing Services has focused its attention on delivering the Internal Investment Programme, established partnering Frameworks and Business Plans in order to achieve WHQS compliance. With the collapse of the NWPP project and the pending completion of the Internal Investment Programme it is now imperative that new tender procedures are established to comply with Audit recommendations, legislative requirements and general best practice.

## **B - Considerations**

### **2.0 Considerations**

- 2.1 The aforementioned report to the Housing and Social Services Scrutiny Committee at Appendix A summarises key requirements for complying with procurement rules. In addition, it provides an analysis and option appraisal on different options for future procurement.
- 2.2 Any future Procurement Strategy will involve reviewing stock condition information on completion of the WHQS Internal Investment Programme in order to understand and inform future investment needs of the stock.
- 2.3 The Housing Services proposes to develop a Procurement Strategy to comply with procurement rules and address future investment needs of the Council's housing stock. The strategy will make certain recommendations for subsequent Executive approval.
- 2.4 It is envisaged that procurement and contractor selection processes will be extensive and will need to meet the requirements of OJEU. This process will impose time constraints that must be adhered to and, realistically, any new tendering arrangements will be effective from 2014. In the interim period Housing Services proposes to procure building maintenance contracts via traditional routes e.g. individual contract notices posted on approved procurement web portals such as Sell2 Wales.
- 2.5 The Housing Services intend to engage the services of external consultants with suitable experience to support this transitional process. The Department proposes to utilise existing OJEU compliant framework agreement(s) to secure the appointment of consultancy services for this project which will be the subject of further consultation with the Head of Finance and Head of Legal Services.

## **C – Implications and Impacts**

<b>1</b>	<b>Finance / Section 151</b>	Have been consulted
<b>2</b>	<b>Legal / Monitoring Officer</b>	No comments at this stage. Legal Services to be consulted further during Strategy development.

<b>C – Implications and Impacts</b>		
<b>3</b>	<b>Human Resources</b>	N/A
<b>4</b>	<b>Property Services</b>	Have been consulted
<b>5</b>	<b>Information and Communications Technology (ICT)</b>	N/A
<b>6</b>	<b>Equality</b>	N/A
<b>7</b>	<b>Anti-poverty and Social</b>	N/A
<b>8</b>	<b>Communication</b>	N/A
<b>9</b>	<b>Consultation</b> (see notes – separate document)	
<b>10</b>	<b>Economic</b>	Have been consulted
<b>11</b>	<b>Environmental</b>	N/A
<b>12</b>	<b>Crime and Disorder</b>	N/A
<b>13</b>	<b>Outcome Agreements</b>	

<b>CH - Summary</b>
<p>Housing Services wishes to explore and subsequently adopt a Procurement Strategy for Capital Works that will ensure:</p> <ul style="list-style-type: none"> <li>• Compliance with tendering procedures.</li> <li>• Effective and efficient appointment of suitable contractors.</li> <li>• Competitive tenders that provide value for money.</li> <li>• Local SME's are offered an opportunity to take part in future tendering arrangements.</li> <li>• Continued WHQS compliance.</li> </ul>

**D - Recommendation****The recommendations are as follows:**

**R1** That the Housing Services procure building maintenance contracts via traditional routes e.g. individual contract notices posted on approved procurement web portals such as Sell2 Wales during the interim period, up to April, 2014.

**R2** That the Housing Services engage the services of external consultants with suitable experience to support this transitional process, utilising existing OJEU compliant framework agreement(s) to secure the appointment of consultancy services, which will be the subject of further consultation with the Head of Finance and Head of Legal Services.

**R3** approve the development of a future Procurement Strategy that will be submitted to the Executive for final approval during 2013/14.

**Name of author of report****Dafydd Rowlands****Job Title****Technical Services Manager****Date****10.12.12****Appendices:**

Appendix A – Future Public Sector Procurement Arrangements

**Background papers**

**ISLE OF ANGLESEY COUNTY COUNCIL**

<b>Committee:</b> Housing and Social Services Scrutiny Committee
<b>Meeting date:</b> 19 <sup>th</sup> October, 2010
<b>Relevant Corporate Director:</b> T Gwyn Jones
<b>Relevant Portfolio Holder:</b> Cllr W I Hughes

**Heading of Report:** Future Public Sector Procurement Arrangements

- 1.0 Purpose of Report:** To consider options available for procuring capital works including recommendations for future policy.
- 2.0 Issues for Scrutiny:** The Scrutiny of options available to the Department.
- 3.0 Background:** In accordance with Audit recommendations, Legislative requirements and best practice the Department must review tender procedures in connection with commissioning Capital Contract Works.

**Name, Job Title, Department:**

Dafydd J Rowlands, Technical Services Manager, Housing Services

*Date 8/10/2010*

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**Appendices**

**Previous Relevant Council or Executive Decisions or Local Service Board**

\*List here any previous relevant decisions.

\*If none, state "No previous relevant decisions".

No previous relevant decisions

**Background Papers**

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## **Appendix A**

### **1. INTRODUCTION**

Housing Services have historically and will continue in the future to commission traditional planned maintenance works with annual expenditure of between £2m and £3m. As reported to the Executive in March, 2010 and in response to recommendations made by Audit, the Council is currently reviewing tender procedures in connection with commissioning capital contract works.

The Department wishes to structure its Planned Capital Works in such a way that each contract is big enough to offer the Council value for money, but not so big as to exclude small and medium scale enterprises (SMEs) from carrying out the work.

The work typically involves re-roofing, re-plastering and environmental works such as improvements to access ramps, paths and boundary walls.

There follows a review of legislative requirements, frameworks agreements, option analysis and recommendations.

### **2. APPLICABILITY OF EU PROCUREMENT RULES**

The Public Contracts Regulations 2006 apply to written contracts for a work or works for a contracting authority where the value of the work is above the EU tendering threshold of £3,927,260. Such contracts are termed “public works contracts” and Schedule 2 of the Regulations includes a broad category of building and civil engineering activities.

In any breakdown of elemental costs for a single planned maintenance works contract, each of the work streams (render chimney stacks, cap chimney stack, lead work to chimney stack etc.) is an element of “works”. A “work” is defined as

*“the outcome of any works which is sufficient of itself to fulfil an economic and technical function”.*

### **3. VALUATION AND AGGREGATION**

The value of any contract is the amount the authority will have to pay under it, net of VAT.

There are provisions in the Regulations to stop a contracting authority artificially splitting a project into a number of smaller contracts. Regulation 8 (19) states:

*“A contracting authority shall not enter into separate contracts ..... with the intention of avoiding the application of those Regulations to those contracts”.*

There are also rules governing aggregating the value of similar contracts for the purposes of the tendering threshold. These are known as “aggregation rules”. Where a contracting authority has a “single requirement ... for the carrying out of a work or works” the value of all contracts entered into to fulfil that requirement are aggregated together. If their combined value is above the EU tendering threshold then all of those contracts have to be procured via OJEU. The definition of what is a “work” is therefore crucial to understanding whether aggregation applies.

#### **4. APPLICATION OF AGGREGATION RULES TO PLANNED MAINTENANCE**

The application of the aggregation rules to planned maintenance is problematic, since it is difficult to be clear in the context of works to a number of properties what constitutes a “work”. This is crucial in relation to the Council’s contract for the planned capital works programme since it is only where each of the contracts are for part of the same “work” that their values need to be aggregated together so they all have to be procured via OJEU.

In the Portsmouth case (R v Portsmouth City Council ex parte Coles and George Austin (Builders) Ltd 1995), the builders who were challenging the procurement suggested that various contracts for a “work”, which should be aggregated because they all related to the same function. The Judge rejected this argument. He supported the authority’s separation of those activities into separate contracts in this case on the basis that the result made functional sense. However, in doing so he suggested that contracts for a single programme of the same type of works may need to be aggregated where it makes functional sense to regard those maintenance activities as all being part of a single programme. The Department’s own Internal Investment Programme is an example of a single programme of maintenance activity.

Aggregating all the Council’s planned maintenance contracts together, and treating them as a single programme for the purposes of the aggregation rules would seem to be inconsistent with a later European Court of Justice decision. In that case, it was decided that separate contracts for a maintenance and extension works for existing street lighting networks across different Local Government areas did not need to be aggregated. The street lighting networks in each area were:

*“From a technical point of view, not necessarily interdependant, as they can be restricted to built up areas and no interconnection between them is necessary”.*

Similarly with the Council’s planned maintenance programme, it is possible to argue that contracts for different works in different geographical areas are “not interdependent” and “no connection between them is necessary”.

## 5. FRAMEWORK AGREEMENT

If we let a single contract for all of the planned maintenance works that are required for any period longer than 1 year then the contract will have to be procured via OJEU as its value will be above the EU tendering threshold of just over £3.9m.

It would be possible for the Council to set up a Framework Agreement for its planned maintenance works. A Framework Agreement is a Legal Agreement that establishes the terms (in particular the terms relating to price) for any subsequent contracts that are let. However, it does not commit the Council to let any contract under the Framework.

The maximum permitted duration of a framework agreement is 4 years, other than in 'exceptional circumstances'. EU guidance suggests that "exceptional circumstances" are limited to cases where there would not be sufficient competition for a shorter framework.

There are two types of framework agreement; a single contractor framework and a multiple contractor framework. A multiple contractor framework must include at least 3 contractors.

When letting a framework agreement, the Council must estimate the maximum total value of the contracts it is likely to let under that framework agreement, and set this out in the OJEU notice.

There had to be some means of establishing the expected overall amount payable under each tender, for example by getting contractors to price an "example" or "reference" project.

In order to set up a framework agreement, the Council would have to specify one or more example projects, or a schedule of rates which tenderers are asked to price. This price would then need to be used as the basis of pricing individual called off contracts.

There are two ways in which individual projects can be allocated under multiple contractor framework agreement:

- *"by the application of the terms laid down in the framework agreement without reopening competition";* or
- through holding a mini-competition.



## 5.1 Direct award

It is possible for contracts to be called off *“by the application of the terms in the framework agreement.”*

The terms that are included in the framework agreement to govern call-offs must comply with the EU case law governing award criteria generally. This case law covers both the criteria that can be used and the requirement that they should be disclosed to the bidders. In summary, the law requires these award criteria to be:

- transparent (ie disclosed to bidders and capable of being understood by them);
- objective (this does not mean that all subjective elements must be removed – since, for example, quality is not always measurable, but bidders must know what they are being scored on, how they are scored and be able to understand why they scored better or worse than another bidder on that criterion);
- limited to factors which test which bid is the “most economically advantageous” (ie offers the best value for money);
- weighted (so bidders understand their relative importance); and
- such as enable bidders to be ranked comparatively to each other.

The overriding requirement is that the award criteria do not give the Council unrestricted freedom of choice over who is to be the successful contractor.

On this basis, the kinds of work allocation procedures that could be included in a contractor framework agreement are:

- to offer the work first to the contractor who submitted the best (most economically advantageous) bid when bidding for the framework agreement. If that contractor cannot meet the requirement, or the framework agreement limits the volume of work with any one contractor at any one time, offering the work next to the contractor who submitted the next best bid, and so on;
- to let contracts initially on the basis of mini competitions, but then to move to an objective allocation method based on the costs proposed in those mini-competitions and KPI performance in delivering those contracts; or
- to award contracts initially on the basis of the award criteria used for letting the framework agreement, but with an additional factor for the level of “exposure” to limit the volume of work with any contractor at any one time. Once KPI performance data has been built up to use that KPI data to award each called-off contract.

All of these are legitimate (as are other work allocation methods), as long as the terms for the allocation of call offs set out in the framework agreement objectively identify one contractor as the “economically most advantageous” for the particular call off contract. With this call-off method, the decision must be based on an objective test in the framework agreement itself. It may not be supplemented by any additional decision-making which involves any element of subjectivity.

There is a clear implication in the Regulations that where direct award is used all of the terms for the called off contract must be set out in the framework agreement. This must include sufficient pricing provisions so that there is a clear audit trail from the prices tendered to get onto the framework agreement to the price for the individual called off contract.

## **5.2 Mini-competition**

Where it is not possible objectively to identify a single “economically most advantageous” contractor for the call off contract from the framework agreement, the Council must hold a “mini-competition”. To do this, the Council must:

- consult all the contractors in the framework for the type of works, goods or services being procured, in writing (this can be done by email), to see if they want to bid;
- issue an invitation to tender to all contractors who respond to say they want to bid;
- set a long enough time limit for them to prepare bids;
- keep each bid confidential until the bidding deadline has passed; and
- select the ‘most economically advantageous tender’.

Any mini-competition must be held on the basis of *‘the same or more precisely formulated’* award criteria used letting the framework agreement.

## **6. Small lots exemption**

If the Council does decide to follow an OJEU process for a single larger contract or to set up a framework agreement, the Council could use the “small lots” procedure to let smaller contracts outside this contract.

The Regulations allow the Council to choose not to follow an OJEU procurement for separate contracts forming part of a single requirement for works or a work where the value of the contracts let under OJEU is up to a total value of 20% of the total work, where the estimated value of each of those contracts is less than £810,580.

This means that the Council can let each contract to SMEs directly without having to let them under an OJEU tendering process, The Council can let as many of these separate contracts (whether to the same contractor or not) up to a total of 20% of its anticipated spend on planned maintenance.

The small lots exemption will operate outside of the OJEU procurement regime, although the contract or framework agreement for the 80% balance of the planned capital works programme will need to be procured via an OJEU tendering process.

## **7. Requirements for below-threshold contracts**

If the Council does let individual contracts without following an OJEU process, the EU Treaty principles still apply i.e. the Council must still treat contractors fairly and in line with any tendering rules the Council establishes. This applies also to contracts let under the small lots exemption.

The Council must not discriminate between contractors on the basis of nationality and must adopt fair and transparent procedures for deciding who to let contracts to.

The Council must also comply with (or waive) its own internal standing orders when letting below threshold contractors.

There is no objection to the Council, if it wishes to do so, operating a system to vet contractors to ensure that they meet the necessary preconditions (adequate financial strength, experience, CIS status, CDM competence etc) to be appointed by the Council. Details of contractors who successfully pass the vetting procedures could be kept on a “contractor database”.

If this is a “closed system” that is available only to the Council’s current contractors, the Council risks being accused of a lack of “transparency”. In order to prevent any risk of a challenge, if the Council does go down the route of a series of smaller contracts, the Council should explain its procedures for getting onto this list to all contractors who wish to do so. This could be done via the Council’s website.

## **8. Analysis and Option Appraisal**

Essentially there are 4 options as to how the Council procures this work:

- a. single large contract;
- b. framework agreement with a number of contractors with clear pricing and work allocation procedures;
- c. series of smaller contracts; or
- d. a mixture of a larger contract or framework agreement and a series of smaller contracts under the “small lots” provisions.

- a)** The main advantages of a single larger contract for all the planned capital works are that:
- the Council will be able to run a single OJEU procurement which avoids having to tender a large number of contracts;
  - the Council will have only one contract to administer;
  - the scale of the contract means it will be easier to achieve new employment and training opportunity targets;
  - the contractor will have greater opportunity to co-ordinate the work;
  - materials and working practices can more easily be standardised; and
  - the contractor should be able to achieve economies of scale.

The main disadvantages of a single large contract are that:

- an OJEU process would have to be followed;
- SMEs would be less likely to win the contract; and
- the contractor would be in a much stronger bargaining position with the Council if the contractor is one of a number of contractors and the Council's programme would be much more in the hands of the contractor, having "all its eggs in one basket".

- b)** The main advantages of a framework agreement for all the planned capital works are that:
- the Council will be able to run a single OJEU procurement which avoids having to tender a large number of contracts;
  - the Council will have only a few contracts to administer with the same group of contractors;
  - contractors can share good practice and healthy competition between contractors can be encouraged; and
  - there is a framework for materials and working practices to be standardised (eg through volume purchasing or using the different contractors' supply chains across the framework).

The main disadvantages of a framework are that:

- an OJEU process would have to be followed;
- the tender process could be complicated (but no more complicated than a single contract) since it would be necessary to devise pricing arrangements, against which to invite tenders, that worked across the whole framework;
- the Council would need either to devise objective work allocation procedures within the framework or run a mini-tender for each project;
- SMEs would be less likely to win the contract or a place on the framework (although the framework could be structured so that there were workstreams that were more likely to be won by SMEs); and
- It would have to be limited to 4 years (although this may not be a problem for the Council).

- c) The main advantages of a series of smaller contracts for the planned capital works are that:
- the Council would have maximum flexibility to let those contracts as it wished, including letting contracts in packages that were particularly attractive to SMEs and inviting only SMEs to compete for those contracts;
  - the need for an OJEU tender process is avoided;
  - tendering each contract as and when it is required means that contractors are not having to price across a framework or contract lasting a number of years, so the Council can go with the contractor offering the best value for money at the time of tender;
  - the Council will be able to determine the programme as it goes along, rather than setting out a prospective programme at the outset for tendering purposes; and
  - the Council would be in a much stronger bargaining position since the Council will not “have all its eggs in one basket”.

The main disadvantages of a series of contracts for the planned capital works are that:

- the Council would need to let each contract separately, through tender and in accordance with standing orders;
  - the Council would have to manage several contracts;
  - it will be harder for materials and working practices to be standardised;
  - economies of scale will not be able to be achieved and it will be harder for the work to be co-ordinated; and
  - the scale of each contract means it will be unlikely that they are able to support new employment and training opportunities.
- d) The advantages and disadvantages of a hybrid solution are an amalgam of the advantages and disadvantages of the above options.

## **9. Providing SMEs with realistic tender opportunities**

There are a number of strategies the Council could consider to give SMEs a better chance to compete for some or all of its planned capital works programme:

- Tender a mixture of different sized contracts, generally based on geographical units, with contracts suitable for different sized contractors;
- use the larger contracts to secure targeted recruitment and training opportunities;
- follow a more rigorous tender process for the larger contracts and use benchmarking between contracts to assess what sizes of contracts are most effectively delivered by what type of contractor, then use this information to justify either direct awards of smaller contracts to SMEs.

If we follow an OJEU or other formal tender process, we can set the minimum prequalification requirements in relation to financial strength and size or experience in such a way that small contractors are not unnecessarily excluded by, for example, prescribing a too high turnover requirement.

A PQQ looks back at the suitability of a contractor to deliver a contract. In contrast, an ITT will look at what the tenderer can bring to deliver the contract. Contracts subject to OJEU can only be awarded on the basis of “lowest price” or MEAT. Contracts are usually awarded on the basis of MEAT because of the emphasis on value for money, which seeks to assess the optimum combination of cost and quality for the works.

The award criteria are set by the Council. The Council has a wide discretion on the criteria it can specify in the ITT. We could award the contract on the basis of lowest price if we are reasonably confident that all of the selected contractors will provide the service at the required standard. We could also award the contract on the basis of MEAT, giving price a higher weighting to price in the split between price and quality ratio so that small contractors are not discouraged from tendering because they do not have sophisticated quality procedures larger contractors have.

## **10. Conclusions and Recommendations**

The option most likely to secure the maximum involvement of SMEs would be for the Council to procure the planned capital works programme via series of different sized contracts all outside OJEU. This can be done on the basis of defined programmes for geographical areas.

This is the option which requires the greatest resource from the Council to administer since there will be a large number of contracts to procure and administer annually.

In view of the above, the Department recommends to the Council that consideration be given to setting up a framework agreement with one or more contractors over a period of 4 years for the delivery of Housing Planned Maintenance Works. This option would involve following the OJEU tender process and by following the principles set out in Section 9 above can be structured in such a way as not to disadvantage SME's